exists, so far as we can see, why, in carrying out the provisions of the act, the treasurer, sheriff, and sergeant should be required to perform the duties imposed upon them by the act in the interest of the people for what their services are actually worth, or less, and the clerk should receive as compensation for performing the duties imposed upon him five or six times what such services are worth. If the language of the act fixing his compensation plainly gave him this exorbitant compensation, it would be the plain duty of the court to so decide, for, however absurd or unjust a law may be, it is the duty of the courts to give it full effect, and leave it to the Legislature to amend or make such changes in the law as it may deem proper; but where the language of the act is ambiguous, the courts will give that construction to it which will be the more reasonable and just, and such was the construction placed upon it by the trial court, in our opinion.

It may be true, as argued, that the compensation which the clerks will receive under the construction placed upon the act will be less than their services are worth, or the necessary expenses of performing the duties imposed. This we think is true also in the case of treasurers, sheriffs, and sergeants for performing the services required of them.

Upon the whole case, we are of opinion that the order complained of should be affirmed.

Affirmed.

Note.

A wide-spread interest has been shown in this case. We understand it has been the practice in nearly all of the counties to charge upon the basis which the Clerk of the Court in Rockingham adopted, thus, the public treasury was being relieved of an exorbitant amount for services rendered; in other words, on the basis on which the clerks were charging, the clerk of Rockingham would have received $453.75, whereas on the basis of the decision of the Circuit Court only $27.50 was the amount the Clerk was entitled to. The taxpayers of Virginia by this decision are saved probably $10,000.

SOUTHERN RY. CO. *v.* JOHNSON'S ADM'X.

Nov. 17, 1910.

[69 S. E. 323.]

1. Master and Servant (§ 243*)—Death of Servant—Railroads—Operation—Violation of Rules.—No recovery can be had for the death of a railroad engineer, resulting from a collision caused by his will-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

ful violation of a rule regulating the operation of trains, of which he had knowledge and which remained unrepealed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759, 775; Dec. Dig. § 243.*]

2. Master and Servant (§ 265*)—Death of Servant—Railroads—Rules—Suspension—Waiver—Proof.—Where plaintiff sued for death of a railroad engineer in a collision, due to his violation of a rule, and claimed that the rule had been waived or suspended, the burden was on plaintiff to show that violations of the rule had been so frequent as to become habitual, that they were known or by ordinary care should have been known by those charged with the duty of enforcing the rules, and that such persons with such knowledge took no steps to compel their observance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 894-908; Dec. Dig. § 265.*]

3. Trial (§ 252*)—Instructions.—Where a railroad engineer was killed in a collision due to his violation of signal rules, and the evidence showed neither knowledge of infractions of the rule by the superintendent or his assistants, nor a fixed habit of disregarding the rule, the court erred in submitting to the jury whether compliance with the rule had been suspended or waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 612; Dec. Dig. § 252.*]

Error to Circuit Court, Shenandoah County.

Action by Amos C. Johnson's administratrix against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

WHITTLE, J. The judgment under review was recovered by the defendant in error (plaintiff below) for the alleged negligent killing of her intestate, Amos D. Johnson, in the following circumstances: Johnson was engineman on train 177, a through freight running from Harrisonburg to the Potomac yards, near Alexandria, Va. At 12:35 o clock in the afternoon of November 9, 1908, he was killed at Pugh's Run, a point 1½ miles east of Woodstock, in a head-on collision with No. 263, a local freight train. The situation will be made plain by the following extract from the petition for a writ of error:

"In the operation of trains on the Harrisonburg or Manassas branch, the defendant installed at all telegraph stations what is known as the semaphore.' This semaphore consists of two paddles, one being used for east-bound trains and the other for west-bound trains. These paddles are connected with and operated by the agent or operator at the various stations by means of levers, which are located in the latter's office. The normal

position of these paddles is horizontal, and when in this position the signal shows red, indicating danger. Whenever a train approaches a telegraphic station, the rules require the engineman to sound four short blasts of the whistle, which is a signal to the operator to lower the paddle from danger to proceed, in the event there are no orders held by him for that train. If, however, the operator has orders, the paddle remains at danger. As a station is approached, if the engineman fails to see the paddle fall or changed to proceed before coming to a stop, he is then positively forbidden to proceed or leave that station until he receives either a train order or a clearance card. This clearance card is a written form, signed by the operator, addressed to the particular train, stating that he holds no orders for that train. This card is delivered in duplicate, one of which the conductor hands to the engineman, the other being held by him; the card stating in large letters: 'Conductor and engineman must each have a copy, and see that their train is correctly designated in the above form.' Train orders are delivered by the operator to the conductor. He receives two copies, one for himself and the other for the engineman; it being made the duty of the engineman to demand his copy from the conductor, since, in the movement of trains by orders and observance signals, the responsibility of the engineman, under the rules, is equal with that of the conductor."

At 11:40 a. m. an order was sent to the operator at Edinburg, a station 6 miles west of Woodstock, directing 174 to meet 263 at Woodstock. The same order was delivered to train 263 at Strasburg Junction, a station 12 miles east of Woodstock. Johnson's train arrived at Edinburg at 12:01, and the semaphore being set for danger he gave the required signal, but the paddle remained at danger, which notified him that orders were held for the train, or that he should not proceed until he received an order or a clearance card. There was conflict in the testimony touching the delivery of the order to the conductor at Edinburg informing him that 174 was to meet 263 at Woodstock; but, however that may have been, it is undisputed that Johnson, in flagrant violation of rule 4, departed from Edinburg and proceeded on his journey without having received either an order or a clearance card. The evidence also tends to show that when 174 approached Woodstock, both paddls of the semaphore were down, which under rule 4 was an imperfect signal; and rule 27 declares that "a signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a stop, and the fact reported to the superintendent." The evidence tends further to show that, after remaining at Woodstock about two minutes, Johnson, in violation of the last-

mantioned rule, left that station at 12:29, and the collision occurred at 12:35.

To break the force of Johnson's disregard of these vital regulations the plaintiff undertook to show that they had been so frequently violated by the employees of the defendant as to warrant the jury in believing that the superintendent and his assistants were advised of that condition and acquiesced in the non-observance of the rules. Accordingly the trial court, upon that theory and over the objection of the defendant, instructed the jury "that it is the duty of a railroad company to adopt, promulgate, and enforce proper rules for the guidance and control of its employees engaged in the hazardous duty incident to the moving and running of trains, and particularly to avoid collision between trains moving towards each other on the same track from opposite directions, and that on the failure of said company in either one of the above particulars—that is to say, the adoption, promulgation, and enforcement of said rules—they may find the company negligent. And if they believe from the evidence that the said rules were frequently disregarded by the employees on defendant's trains, with the knowledge or acquiescence on the part of those persons whose duty it was, under other rules of the company negligent. And if they believe from the evidence that jury may be warranted from such circumstances in imputing knowledge of the condition of affairs in this respect to the railroad company, or the want of ordinary care on its part in the performance of its duty if it remained in ignorance of a disregard of its rules as aforesaid."

The plaintiff, in support of the instruction, examined six railroad men as witnesses, three of whom—a conductor, an engineman, and a brakeman—with an average experience of 14 years each, testified that they had never violated the rule themselves, and had no knowledge of its having been violated by other employees. Of the remaining three witnesses, Chapman, who had been station agent at Woodstock for 27 years, testified that the rule had been in force generally throughout his entire term of service; that during that period, however, he had known the rule to be disregarded, but he could recall no particular instance of its violation. Yochum, a conductor, and Hawkins, an extra brakeman, also testified that they had known the rule to be violated. The plaintiff likewise proved the general rule of the company requiring employees to report all violations of rules to the superintendent or his assistant, who are charged with their enforcement.

The defendant then introduced the superintendent and assistant superintendents, whose terms of service covered a period of 7 years, and proved that they had uniformly enforced observance

of the rule, and that no single instance of its violation had been brought to their notice.

The imperative necessity for adherence to the policy of enforcing strict observance of the rules in question is obvious. Indeed, failure of duty either by railroad companies or their employees in a matter so essential to the protection of life and property would be little short of criminal. And the courts cannot be too careful to avoid impairing the usefulness of such rules by engrafting upon them unnecessary limitations by way of exception or qualification.

In Elmgren *v.* Chicago, etc., R. Co., 102 Minn. 41, 112 N. W. 1067, 12 L. R. A. (N. S.) 754, the court says: "It is of the utmost importance, as a matter of public policy, that the strict observance of these rules should be insisted upon by railroad companies, and, whenever opportunity occurs, by the courts. The appalling fatalities to human life and the great destruction of property consequent upon mismanagement and neglect of signal devices is in large measure avoidable. However much sympathy may be naturally felt for overworked employees, a rule of law which would ignore in any degree the safety of the public would be little less than calamitous.. If a clear case of violation of the solemn duty on the part of an employee to regard signals be shown, he must be held to be in no position, in the absence of a satisfactory explanation, to recover damages in a measure occasioned by his own fault."

The correct principle deducible from the authorities with respect to waiver or suspension of a rule by way of estoppel from acquiescence may be stated as follows: "The burden is upon the plaintiff to establish three elements, all of which must concur: (1) The violations must have been so frequent as to become habitual. (2) The violations must have been known, or by the exercise of ordinary care should have been known, by the employee or employees charged with the duty of enforcing the rules involved. (3) The employee charged with the duty of enforcing the rule, being thus aware of its habitual violation, took no steps to secure and compel an observance." Wright *v.* Southern Ry. Co., 101 Va. 36, 42 S. E. 913; Driver *v.* Southern Ry. Co., 103 Va. 650, 49 S. E. 1000, and Lane Bros. *v.* Seakford, 106 Va. 93, 55 S. E. 556, are in harmony with the great weight of authority on the subject and support the principle above enunciated.

In the Wright Case it was shown that the rule there involved was uniformly and continuously disregarded, with the knowledge of the foreman of car repairs, whose duty it was to enforce it, and who took no action whatever in regard to its violation.

In the Driver Case (citing the former case with approval) the

court says: "For it it settled law that an employee will not be absolved from the imputation of contributory negligence for violating a rule of the master, made for his own, as well as for the protection of others, because that rule is habitually disregarded, unless it appears (and the burden is on the plaintiff to show this) that it was done with the knowledge of the master, or he had so neglected to enforce it as that his conduct amounted to a suspension of the rule."

Lane Bros. Co. *v.* Seakford, *supra,* proclaims the general principle that the master must exercise reasonable care to enforce proper rules adopted for the guidance and protection of his employees.

In Bailey's Personal Injuries, § 3367, it is said: "Evidence that employees of a railroad company were accostomed to act in violation of a rule is not admissible to establish a waiver of the rule, unless it be shown that a knowledge of the custom was known to the officers charged with the enforcement of the rule."

Again, at section 3372b, the learned author says: "In order to claim a waiver of a known rule by an employee on the ground that the rule had been habitually disregarded, and relieve him from the imputation of contributory negligence in failing to observe it, he must show that knowledge of such non-observance by the employees was brought home to the master. * * * It makes no difference that other employees frequently or customarily disregarded the rule, unless the company, with knowledge of their practice acquiesced in it in a way to sanction it, or practically to abrogate the rule. Nothing would relieve the servant from abiding by his uniform orders."

In Francis *v.* Kansas City, etc., R. Co., 110 Mo. 387, 19 S. W. 935, the court says: "It would be most unreasonable and unjust, after imposing upon the master the duty of promulgating a rule for securing the safety of his servant, to permit the servant, to recover from the master damages for injuries which the observance of the rule would have prevented. As the master is bound at his peril to make the rules, the servant should be equally bound at his peril to obey them. In such case the disaster is brought upon the servant by his own voluntary act, and he, and not the master, who has discharged his duty, should bear the consequences. So it has been uniformly ruled."

This court has consistently recognized and adhered to the rule which denies recovery whenever the injury complained of was due to the servant's willful violation of a regulation prescribed for his own safety. Sheeler *v.* C. & O. Ry. Co., 81 Va. 188, 59 Am. Rep. 654; Darracott *v.* C. & O. Ry. Co., 83 Va. 288, 2 S. E. 511, 5 Am. St. Rep. 266; S. V. R. Co. *v.* Lucado, 86 Va. 390, 10 S. E. 422; R. & D. R. Co. *v.* Risdon, 87 Va. 335, 12 S.

E. 786; N. & W. R. Co. *v.* Williams, 89 Va. 165, 15 S. E. 522; R. & D. R. Co. *v.* Pannill, 89 Va. 552, 16 S. E. 748; R. & D. R. Co. *v.* Dudley, 90 Va. 304, 18 S. E. 274; Driver *v.* Southern Ry. Co., supra; Williams *v.* Norton Coal Co., 108 Va. 608, 62 S. E. 342. See, also, Labatt on Master & Servant, § 365, and note on "Disobedience of Rules" to Bist *v.* London, etc., R. Co., 8 Am. & Eng. Ann. Cas. 3.

In the present case it is true there was some evidence of violations by employees of the defendant of the rules involved in instruction No. 1, yet direct knowledge of such infractions was not brought home to the superintendent or his assistants; nor did the evidence show the habit or custom of disregarding the rules to such extent that knowledge might be inferred therefrom. In these circumstances, the trial court erred in giving instruction No. 1; and for that error the judgment must be reversed.

We have confined our observations to this single assignment of error, because it was the one chiefly pressed upon us in argument, and also because it presents the main reliance of the defendant in error to justify the recovery

As the case must be remanded for a new trial along essentially different lines, we have purposely refrained from expressing any opinion on the weight of the evidence. Reversed.

Note.

The correctness of the rule denying recovery for injury or death resulting to an employee of a railroad from his willful violation of a rule promulgated for the regulation of the operation of trains, as laid down in the first headnote, is so well established as to need no comment. See subject note in 43 L. R. A. at p. 350. See, also, Wetzel *v.* Baltimore, etc., R. Co., 147 Ill. App. 195; Chicago, etc., R'y Co. *v.* Shipp, 174 Fed. Rep. 353, 98 C. C. A. 257; Van Camp *v.* Wabash R. Co., 141 Mo. App. 344, 125 S. W. 530; Great Northern R'y Co. *v.* Hooker, 170 Fed. Rep. 154, 95 C. C. A. 410; New Connellsville, etc., Co. *v.* Kilgore (Ala.), 50 So. 205; Crawford *v.* Southern R'y Co., 150 N. C. 619, 64 S. E. 589; Cleveland, etc., R'y Co. *v.* Gossett (Ind.), 87 N. E. 723; Collins *v.* Mineral, etc., R'y Co., 136 Wis. 421, 117 N. W. 1014; Yougue *v.* St. Louis, etc., R. Co., 133 Mo. App. 141, 112 S. W. 985; Cogville *v.* Louisville, etc., R. Co. (Ala.), 44 So. Rep. 683; Snellen *v.* Kansas City, etc., Ry. Co. (Ark.), 102 S. W. 193; New York, etc., R. Co. *v.* Ropp (Ohio), 81 N. E. 748, where it was held that the presence of a superior servant of the master did not excuse the disobedience; Dallas Coal Co. *v.* Rotenberry, 85 Ark. 237, 107 S. W. 997; St. Louis, etc., R'y Co. *v.* Dupree, 105 S. W. 878, 84 Ark. 377; Boucher *v.* Oregon, etc., Co., 50 Wash. 627, 97 Pac. 661; International, etc., R. Co. *v.* Brice (Tex. Civ. App.), 111 S. W. 1094.

The following West Virginia cases support this rule: Beall *v.* Pittsburgh, etc., R. Co., 38 W. Va. 525, 18 S. E. 729; Eastburn *v.* Norfolk, etc., R. Co., 34 W. Va. 681, 12 S. E. 819; Overby *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 16 S. E. 813; Davis *v.* Nuttallsburg, etc., Coke Co., 34 W. Va. 500, 12 S. E. 539; Robinson *v.* West Va., etc.,

R. Co., 40 W. Va. 583, 21 S. E. 727; Johnson *v.* Chesapeake, etc., R. Co., 38 W. Va. 206, 18 S. E. 573.

Such violation will bar a recovery although it concurred with the master's negligence in causing the action. Hampton *v.* Chicago, etc., R. Co., 143 Ill. App. 91, judgment affirmed 86 N. E. 243.

It will preclude recovery unless the accident might have been prevented after the danger was, or might in the exercise of ordinary care have become, known to the master or his representatives. Neas *v.* Chicago, etc., R'y Co., 138 Mo. App. 484, 120 S. W. 120.

But where an injury was caused by the failure of the railway company to comply with the Federal statutes as to car-coupling, contributory negligence in disobeying the rule requiring the performance of the work in a particular manner, will not bar a recovery. Chicago, etc., Ry. Co. *v.* Walters, 120 Ill. App. 152, affirmed in 217 Ill. 87, 75 N. E. 441.

The rule as to effect of disobedience is thus stated in a full subject note in 24 L. R. A. 657: The disobedience by a servant of a rule which his master has established to promote his safety in the prosecution of the work assigned to him will preclude his holding the master responsible for a resulting injury if he has notice of the rule which is at the time applicable to him and to the duty to be performed and has not been waived or abrogated, and if the disobedience is unnecessary and contributes to the injury."

Coupling Cars by Hand.—Where the rules of the company require couplings to be made with a stick when practicable, the company is not liable for injuries received by brakeman while making the coupling without a stick, if the stick can be used to advantage. Richmond, etc., R. Co. *v.* Pannill, 89 Va. 552, 16 S. E. 784; Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 288, 2 S. E. 511; Norfolk, etc., R. Co. *v.* Briggs, 1 Va. Dec. 757.

Getting on and off Train While in Motion.—Where a rule of the railroad company forbade their servants from getting on and off trains when in motion, a servant who was injured while getting off a moving engine by tripping over wires which were exposed, failed in an action against the company. Overby *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 16 S. E. 813.

And so where a section hand was killed in attempting to mount a passing engine, contrary to the rules of the company, of which he had notice, it was held, that the company was not liable; and it was immaterial whether or not his getting on the engine was objected to by those in charge of it. Shenandoah Valley R. Co. *v.* Lucado, 86 Va. 390, 10 S. E. 422.

Coupling Cars While in Motion.—And where a brakeman is injured while violating a rule of the company which forbids the coupling of cars while in motion, he can not recover. Johnson *v.* Chesapeake, etc., R. Co., 38 W. Va. 206, 18 S. E. 573; Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 288, 2 S. E. 511.

Sending Back Flagman or Putting Out Danger Signal.—Where the proximate cause of the death of the plaintiff's intestate was his failure to comply with the rules of the company which required him, when his train was delayed more than three minutes at a regular stopping place, or when it was stopped at an unusual place or fails to make its schedule time, to go back and put down danger signals to warn any trains moving in the same direction, it was held, that there could be no recovery. Driver *v.* Southern R. Co., 103 Va. 650, 49 S. E. 1000.

Running Cars Down Grade without an Engine.—Where, contrary to the rules of the company, a conductor allowed cars to be shifted

and run down grade without an engine to control them, and while he was between the cars a brakeman, without objection from the conductor, caused another car to run down the same way, which, by reason of defective brakes, became unmanageable and ran into the first named cars with such violence as to cause injury to the conductor, it was held, that the conductor could not recover. Richmond, etc., R. Co. *v.* Dudley, 90 Va. 304, 18 S. E. 274.

Failure to Apply Brakes Where Train Separates.—Richmond, etc., R. Co. *v.* Tribble, 97 Va. 495, 24 S. E. 278.

Rule as to Imperfect Signal or Absence of Any.—Where a rule of a railroad company provides that "a signal imperfectly displayed, or the absence of a signal where one is usually shown, must be regarded as a danger signal," a contention of the plaintiff that he was injured because of the absence of a danger signal is untenable Norfolk, etc., R. Co. *v.* Williams, 89 Va. 165, 15 S. E. 522.

Disobedience Must Be Unnecessary.—Disobedience of the rule is not negligence, if the work could not have been done in obedience to it. Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361; Hayes *v.* Bush, etc., Co., 41 Hun. 407; Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545; Alexander *v.* Louisville, etc., R. Co., 83 Ky. 589; East Line, etc., R. Co. *v.* Scott, 71 Tex. 703.

Willful Injury.—A recovery may be had if there is a failure of ordinary care to avoid injury after knowledge of the peril of one injured by reason of his violation of the rule. Louisville, etc., R. Co. *v.* Watson, 90 Ala. 68; Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514.

Abrogation or Waiver of Rule.—And that a rule habitually disregarded with the knowledge of the company, or the officer charged with its enforcement, is to be considered as waived, is equally well settled. See Alabama, etc., R. Co. *v.* Roach, 110 Ala. 266; Texas, etc., R. Co. *v.* Leighty, 32 S. W. 799; Wright *v.* Southern P. Co., 14 Utah, 383; Spaulding *v.* Chicago, etc., R. Co., 98 Ia. 205; Lowe *v.* Chicago, etc., R. Co., 89 Ia. 420; Northern Pac. R. Co. *v.* Nickels, 50 Fed. Rep. 718, 1 C. C. A. 625; Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 338; Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128; McNee *v.* Coborn, etc., Co., 170 Mass. 283; St. Louis, etc., R'y Co. *v.* York, 92 Ark. 554, 123 S. W. 376; Kenny *v.* Marquette, etc., Co., 243 Ill. 396, 90 N. E. 724; St. Louis, etc., R'y Co. *v.* Dupree, 84 Ark. 377, 105 S. W. 878; Burch *v.* Southern Pac. Co., 104 Pac. 225; Austin *v.* Central, etc., R. Co., 3 Ga. App. 775, 61 S. E. 998; Central, etc., Ry. Co. *v.* Mobley, 6 Ga. App. 33, 64 S. E. 300; Bordeaux *v.* Atlantic Coast Line R. Co., 150 N. C. 528, 64 S. E. 439; Collins *v.* Mineral, etc., Ry. Co., 136 Wis. 421, 117 N. W. 1014; Feneff *v.* Boston, etc., R. R. (Mass.), 82 N. E. 705; Bussey *v.* Charleston, etc., R'y Co., 78 S. C. 352, 58 S. E. 1015.

So where such rule is habitually violated, to the knowledge of the employees and the master, or has been violated so frequently and openly, and for such a length of time, that the employer could, by the use of ordinary care, have ascertained its nonobservance, it will be considered waived by the master. Smith *v.* Atlantic, etc., R'y Co. (N. C.), 61 S. E. 575. See, also, Genson *v.* Will, etc., Co. (Cal.), 89 Pac. 113; Biles *v.* Seaboard, etc., Ry. Co., 143 N. C. 78, 55 S. E. 512; Texas, etc., Ry. Co. *v.* Conway (Tex. Civ. App.), 98 S. W. 1070; Haynes *v.* North Carolina R. Co., 143 N. C. 154, 55 S. E. 516, where it is said that a rule designed solely for the safety of servants will be enforced unless it is shown that the railroad company has insisted on a disregard of the rule in order to hasten the work.

It was held in McCarthy *v.* Pennsylvania R. Co., 189 N. Y. 170, 81

N. E. 770, that instructions given by a railroad train master at a school for instruction in the rules for the road, were sufficient to constitute a general custom, after being in force for four years, superseding a rule to the contrary.

The rules of the company are not binding on the employee (1) if not brought to his attention; (2) habitually disregarded with knowledge and acquiescence of superior officers; (3) when usage of master tends to mislead in violation of the rules. Little Rock, M. R. & T. R. Co. *v.* Leverett, 48 Ark. 333. If the master permits such a departure from the established rule as to create uncertainty as to its operation, and injury results, he cannot take advantage of its violation in the particular case. Silver Cord Combination Min. Co. *v.* McDonald, 14 Colo. 191.

But where the danger incurred in violating a rule was so obvious that no prudent person would incur it, the habitual violation of the rule did not excuse the employee from the consequences of his negligence, although it was proper to consider the custom with the other evidence on the question of negligence. El Dorado, etc., R. Co. *v.* Whatley (Ark.), 114 S. W. 234.

See, however, Haley *v.* Solvay Process Co., 112 N. Y. Supp. 25, 127 App. Div. 753, where the general rule was held to apply as to habitual violation of a rule to wear goggles to protect the eyes from injury while performing certain acts fraught with possible danger.

Burden of Proof.—But the burden is upon the employee to prove acquiescence by the company in the infraction or disregard of the rule. Richmond, etc., R. Co. *v.* Rush, 71 Miss. 987; White *v.* Louisville, etc., R. Co., 72 Miss. 12; O'Neill *v.* Keokuk, etc., R. Co., 45 Ia. 546; Missouri, etc., Ry. Co. *v.* Collier, 157 Fed. Rep. 347, where an unauthorized act of one employee was held not to establish any such custom. Elliott *v.* Canadian Pac. Ry. Co., 161 Fed. Rep. 250, where it did not appear that the rule had been previously violated.

Notice must be brought home to the master. Hampton *v.* Chicago, etc., R. Co., 143 Ill. App. 91, judgment affirmed in 86 N. E. 243; Atchison, etc., R'y Co. *v.* Sowers (Tex. Civ. App.), 99 S. W. 190.

Failure on some occasions to observe does not show abandonment or suspension. Houston, etc., R. Co. *v.* Ravanelli (Tex.), 123 S. W. 208.

Although such acquiescence may be implied from the company's knowledge thereof through its officers, which may be shown either by direct proof or by circumstances. Alabama, etc., R. Co. *v.* Roach, 110 Ala. 266; Strong *v.* Iowa, etc., R. Co., 94 Ia. 380; Lowe *v.* Chicago, etc., R. Co., 89 Ia. 420; Spaulding *v.* Chicago, etc., R. Co., 98 Ia. 205; Louisville, etc., R. Co. *v.* Richardson, 100 Ala. 232; Chicago, etc., R. Co. *v.* Flynn, 154 Ill. 448; McNee *v.* Coborn, etc., Co., 170 Mass. 283; O'Donnell *v.* Alleghany, etc., R. Co., 59 Pa. 239; Pennsylvania R. Co. *v.* Langdon, 92 Pa. 21; Waterbury *v.* New York, etc., R. Co., 17 Fed. Rep. 671; Central, etc., Co. *v.* Maltsby, 90 Ga. 630; Horan *v.* Chicago, etc., R. Co., 89 Ia. 328; Lake Erie, etc., R. Co. *v.* Craig, 80 Fed. Rep. 488, 25 C. C. A. 585.

As to disobedience of rules in obedience to orders of superior, see case note in 8 L. R. A. N. S., 90, where it is said: "The decisions are far from harmonious as to the effect of orders to a servant by a superior to justify him in disobeying a rule of service. It is said in Labatt on Master and Servant, vol. 1, page 962: 'Whether the order in any particular instance was an excuse for infringing the rule depends partly upon the subject-matter of the rule and partly upon the views held by the court with regard to the doctrine of vice principalship.' The cases need to be considered in the light of this

statement, but do not seem to be capable of being entirely harmonized by any theory of the subject." And again in conclusion: "It will seem from the above cases that the decisions are in a somewhat perplexing condition. The rank of the superior who gave the order, and the obviousness or degree of danger involved in violating the rule, are both elements which the courts have taken into account, in deciding some of the cases; but no general proposition seems to be certainly deducible from them which the courts would all accept." J. F. M.

EATON *v.* MOORE *et al.*

Nov. 17, 1910.

[69 S. E. 326.]

1. Pleading (§ 8*)—Conclusions.—An allegation that dynamite caps were improperly stored was improper, as stating a mere conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12, 13; Dec. Dig. § 8*; Negligence, Cent. Dig. § 182]

2. Explosives (§ 8*)—Negligence—Pleading—Sufficiency.—Allegations that defendants improperly stored dynamite caps, that plaintiff, an infant, got possession of the caps, and in some way, and without his fault, the caps were exploded, doing great injury in and about his eyes, resulting in total blindness, are insufficient to show actionable negligence by defendants, or how the accident occurred.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

3. Pleading (§ 18*)—Declaration—Requisites.—A declaration must allege material facts sufficient to show a complete right of action in plaintiff, and the facts must be set forth with definiteness and certainty.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 39; Dec. Dig. § 18.*]

Error to Circuit Court, Rockingham County.

Action by one Eaton against J. S. Moore and another. Judgment for defendants, and plaintiff brings error. Affirmed.

WHITTLE, J. This writ of error is to a judgment for defendants on demurrer to the amended declaration. The declaration alleges in substance that the defendants, J. S. Moore and W. C. Switzer, were the owners of certain dynamite caps, easily exploded and very dangerous, which they had stored in an open outhouse located in the yard surrounding and close to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.